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In The

Supreme Court of the United States

ABU ABDUL RAUF ZALITA,
Petitioner,

v.

GEORGE W. BUSH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2007

QUESTIONS PRESENTED

1. Whether the Executive may transfer a noncitizen imprisoned at the United States Naval Station at Guantanamo Bay to a human rights abusing regime, where he is more likely than not to face torture and persecution, pending a determination by this Court in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, of whether Guantanamo detainees have a right to habeas corpus that is protected by the Suspension Clause of the United States Constitution?

2. Whether the Military Commissions Act of 2006, Pub. L. No 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over claims by a foreign citizen imprisoned at the United States Naval Station at Guantanamo Bay that his imminent transfer to the custody of a foreign government where he is more likely than not to face torture and persecution would violate the Fifth Amendment to the United States Constitution and treaties of the United States.

3. Whether the Fifth Amendment, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, or the 1951 Convention Relating to the Status of Refugees impose judicially enforceable restraints upon the Executive's authority to transfer a detainee to the custody of a foreign government where he is more likely than not to be tortured and has a well-founded fear of persecution.

LIST OF ALL PARTIES

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court of appeals (*Zalita v. Bush, et al.*, No. 07-5129) were:

Abu Abdul Rauf Zalita, a.k.a., Abdul Ra'ouf Ammar Mohammad Abu Al Qassim (Appellant); and

George W. Bush, Donald Rumsfeld, Jay Hood, and Mike Bumgarner (Appellees).

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Human Rights Watch, *Ill-fated Homecomings: Tunisian Case Study of Guantanamo Repatriations* (2007), *available at* http://hrw.org/reports/2007/tunisia0907/ 8
Human Rights Watch, Press Release, *U.S.: Don't Send Guantanamo Detainees Home to Torture and Abuse* (Sept. 5, 2007), *available at* http://hrw.org/english/docs/2007/09/05/tunisi16792.htm 23
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U.S. Dep't of Defense, Press Release No. 1287-06, *Detainee Transfer Announced* (Dec. 17, 2006), *at* http://www.defenselink.mil/releases/release.aspx?releaseid=10301 8

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PETITION FOR WRIT OF CERTIORARI

Petitioner Abu Abdul Rauf Zalita, a.k.a., Abdul Ra'ouf Ammar Mohammad Abu Al Qassim, ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the district court (Urbina, J.) denying Petitioner's motion for a preliminary injunction (App. 4a-6a) is unreported, but is available at 2007 U.S. Dist. LEXIS 28951. The opinion of the court of appeals denying Petitioner's motion for injunctive relief and dismissing the case for lack of subject matter jurisdiction (App. 2a-3a) is not reported, but is available at 2007 U.S. App. LEXIS 9975.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2007. On July 18, 2007, the Chief Justice granted Petitioner's application (07A52) to extend the time for filing a petition for a writ of certiorari until September 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

2. The following statutory provisions are set forth in relevant part in the Appendix hereto:

a. Detainee Treatment Act of 2005 ("DTA"), § 1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680, 2741-43 (App. 7a-9a);

b. Military Commissions Act of 2006 ("MCA"), § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (*id.* 10a-11a).

INTRODUCTION

Petitioner, a Libyan citizen, is detained at Guantanamo Bay. He has been held there without charge or trial for more than five years. The Executive plainly has no interest in detaining him further for investigation or prosecution, and has cleared him for release from Guantanamo. The Executive has twice attempted to repatriate him to Libya, the country from which he fled more than ten years ago to avoid religious persecution. Petitioner has a credible fear that he will be subject to imprisonment, torture and possible summary execution if he is forcibly returned to Libya, and has resisted the Executive's attempts to repatriate him to that country.

Petitioner filed a Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief in the district court, invoking the power of the federal courts to obtain his release from Guantanamo and to avoid rendition or transfer to a country where he would likely face persecution and torture. Petitioner also filed emergency motions seeking injunctive relief to prevent his repatriation to Libya. That relief was ultimately denied by the district court, court of appeals, and this Court, and Petitioner's habeas case was dismissed.

Petitioner now asks this Court for a writ of certiorari to consider whether the MCA impermissibly removes federal court jurisdiction over his claims. The Court has granted certiorari in the related consolidated appeal *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, to consider questions concerning the rights of detainees in Guantanamo. In the meantime, Petitioner faces an imminent risk of repatriation to Libya. Accordingly, he requests that the Court grant his petition for a writ of

certiorari and either resolve the serious constitutional questions raised in his petition or, alternatively, hold this case in abeyance pending the Court's decision in *Al Odah* and *Boumediene*.

STATEMENT OF THE CASE

A. Petitioner's Risk of Torture and Persecution by Libyan Authorities

Since December 2006, Petitioner has been challenging the Executive's effort forcibly to transfer him to the custody of Colonel Muammar Al Qadhafi's dictatorship without affording Petitioner any opportunity to raise his well-documented fear that he will face torture and persecution at the hands of Libyan officials. Petitioner, a Libyan citizen, has spent most of his adult life fleeing the possibility of arrest, persecution, torture and even death at the hands of the Qadhafi regime. While at Guantanamo, Petitioner has consistently maintained that he fled persecution in Libya and fears torture if he is returned there. He did so during his Combatant Status Review Tribunal (CSRT) in 2004, as well as during his Administrative Review Board proceeding in 2005. He has raised his fear of torture and persecution with representatives of the International Committee of the Red Cross, U.S. government interrogators, his "personal representative" for his CSRT, and several other military officials. U.S. officials referred Petitioner to his lawyer, told him they did not know how he could apply for asylum or refugee protection, or ignored his requests entirely.

Petitioner is and has long been an observant Muslim. He has no history of terrorist activity and adamantly denies the military's allegations that he is a member of any terrorist organization. After being conscripted as a teenager into the Libyan Army in 1990, the onset of psychiatric illness forced Petitioner to desert the army and return to his father's home. Shortly thereafter, he fled Libya and lived in Pakistan and Afghanistan for approximately ten years. While in both countries, he had no money and was unable to work because

of his psychiatric illness. He received charity from a guest house in Peshawar, Pakistan managed by Libyans who later became involved in the Libyan Islamic Fighting Group (LIFG), a political group opposed to the Qadhafi regime. Petitioner in no way was aware that this group might be considered a terrorist organization and he was never a member of it.

Petitioner also traveled to Afghanistan and lived in a guesthouse managed by an Afghan. During this time, his psychiatric illness prevented him from working and he depended upon the charity of those running the guesthouses for his survival.

In 2000, he married an Afghan citizen and settled in Kabul to start a family. When the U.S. bombing of Kabul began in October 2001, Petitioner and his pregnant wife fled to Jalalabad, where their daughter was born. They stayed there until it was no longer safe and then left for Lahore, Pakistan. Petitioner was living peacefully with his family when he was kidnapped from his home and handed over to Pakistan military authorities for a bounty. In August 2002, after several months' imprisonment, he was transported to U.S. custody at Guantanamo. Petitioner, who is eligible for Afghan citizenship, is now seeking family reunification with his wife and extended family in Afghanistan rather than face torture or persecution in Libya.

Petitioner has a well-founded belief that Libyan officials know that he lived in the guesthouse and from this information, wrongly suspect that he was and is a member of an opposition group. These concerns have been reinforced by his CSRT proceeding conducted at Guantanamo, which failed to provide even minimal due process protections and which considered evidence obtained through torture. The CSRT's findings, which erroneously associate him with the LIFG, are a matter of public record and easily available to the Libyan government.

Petitioner faces a grave risk of torture and persecution if forcibly returned to the custody of the Libyan dictatorship. The Qadhafi regime has a long history of persecuting, torturing and extradjudicially killing members or those perceived to be members of political opposition groups. According to the U.S. Department of Defense, Libya is a modern-day "authoritarian regime" governed by the unchallenged authority of Colonel Muammar Al-Qadhafi.[1] Since assuming control, the Qadhafi dictatorship has maintained power through severe repression of any political dissent, using methods that include arbitrary arrest, detention, routine torture, and extrajudicial assassinations.

Moreover, according to the U.S. State Department, "security personnel routinely tortured prisoners during interrogation or as punishment."[2] The 2006 State Department Country Report on Libya explains that the "reported methods of torture and abuse include chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice in open wounds, breaking fingers and allowing the joints to heal without medical care, suffocating with plastic bags, prolonged deprivation of sleep, food and water, hanging by the wrist, suspension from a pole inserted betweens the knees and elbows, cigarette burns, threats of dog attacks, and beatings on the soles of the feet."[3] Qadhafi also has incited extrajudicial assassinations, separate from the imposition of death sentences by security courts or ad hoc courts.[4] The risk of torture, abuse and persecution confronts any person who

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[1] U.S. Dep't of State, 2006 Country Reports on Human Rights Practices, Libya, (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78858.htm.

[2] *Id.*

[3] *Id.*

[4] *Qaddafi Urges Death for Foes on Anniversary of 1969 Coup*, N.Y. TIMES, Sept. 1, 2006, at A10.

is associated, or even perceived to be associated, with political opposition groups and is returned to Libya.

B. The Petition and Complaint, Application for Asylum and Withholding of Removal, and Motion for a Preliminary Injunction

Petitioner filed his Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief on June 22, 2005. In his petition and complaint, he invoked the jurisdiction of the federal courts under, *inter alia*, 28 U.S.C. § 1331 for claims arising under the Fifth Amendment to the Constitution and treaties of the United States. Petitioner specifically brought three claims under the Fifth Amendment, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[5] and the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention"),[6] and the Alien Tort Statute[7] challenging his unlawful rendition to Libya. He alleged that he was at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture and that this transfer created a foreseeable and direct risk that he would be subject to torture in violation of his constitutional and treaty-based rights.

On July 25, 2005, the district court issued an order requiring the government to provide Petitioner with 30 days advance notice of any intended transfer of Petitioner to the custody of a foreign government. On December 8, 2006, Respondents notified Petitioner's counsel that they intended to transfer him to the custody of Libyan officials for

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[5] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GOAR Supp. No.51, at 197, U.N.Doc. A/RES/39/708 (1984).

[6] The 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, entered into force Apr. 22, 1954.

[7] 28 U.S.C. § 1350.

"continued detention, investigation, and/or prosecution as that country deems appropriate, consistent with the policies and practices pertaining to such transfers as outlined in the declarations" of Defense Department and State Department officials.

Counsel quickly met with Petitioner at Guantanamo and he reaffirmed his ongoing fear of torture and persecution by the Qadhafi regime. Petitioner sought additional time to prepare his application for asylum, withholding of removal and CAT protections and to file a motion to enjoin his transfer. On February 15, 2007, the district court issued an order requiring the government to provide Petitioner with an additional 60 days advance notice of any intended transfer. The Respondents gave this notice on February 20, 2007.

On April 20, 2007, Petitioner filed in the district court a motion for a temporary restraining order and preliminary injunction to prohibit his transfer as a violation of his constitutional and treaty-based rights. Petitioner's motion was supported by three expert declarations explaining that torture and persecution are routinely used by Qadhafi and that diplomatic assurances fail to prevent torture, extensive documentation of the Qadhafi dictatorship's routine use of torture and persecution of political opponents and religious Muslims, and Petitioner's sworn declaration attesting to the basis of his fear of torture and persecution.[8] Petitioner also emphasized the historical and constitutional role of the Court to safeguard individuals from the abuse of Executive authority and described judicial review of transfers involving a risk of torture in cases in other contexts of international prisoner or detainee transfers, such as extradition.[9]

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[8] These materials are appended to Petitioner's Application for an Original Writ of Injunction (06A1005) filed with this Court on April 25, 2007.

[9] On April 29, 2007, Petitioner also sought to prevent his forcible removal to Libya by submitting an Application for Asylum, Withholding

In opposition to Petitioner's motion, Respondents argued that the MCA, as interpreted by the D.C. Circuit in the consolidated appeal of *Boumediene*, "altogether deprived" the court of jurisdiction over Petitioners claims. More broadly, the government asserted that even if jurisdiction existed, the Executive's transfer authority in Guantanamo was beyond the reach of any court. Respondents claimed that it is the "policy" of the United States not to transfer a detainee to a country where it is more likely than not that the detainee will be tortured, and that when necessary, the United States seeks "diplomatic assurances" that the detainee will not be tortured or persecuted.[10] Respondents claimed, however, that judicial review and "second-guessing" of Executive transfer decisions would "trample separation of powers" by interfering with the Executive's military and foreign affairs responsibility.

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of Removal, and Protection Under the Convention Against Torture and supporting documentation to counsel for Respondents; William J. Haynes, Office of the General Counsel for the Department of Defense; Admiral James G. Stavridis, Commander, U.S. Southern Command, and Clint Williamson, Ambassador-at-Large, U.S. Department of State, Office of War Crimes Issues. Despite Petitioner's ongoing requests, none of the U.S. officials who received his application have taken any formal action in response to it.

[10] In the past, Respondents' "policy" has not prevented it from transferring individuals from Guantanamo to countries with well-documented records of torture and human rights abuses, such as Egypt, Libya, Iraq, Iran, Jordan, Tajikistan, Russia, and Tunisia. See, *e.g.*, U.S. Dep't of Defense, Press Release No. 1287-06, *Detainee Transfer Announced* (Dec. 17, 2006), *at* http://www.defenselink.mil/releases/release.aspx?releaseid=10301 (listing Egypt, Iran, Iraq, Jordan, Kazakhstan, Libya, Morocco, Russia, Tajikistan, and Uganda as among countries to which detainees have been transferred); *see also* Human Rights Watch, *Ill-fated Homecomings: A Tunisian Case Study of Guantanamo Repatriations* (2007), *available at* http://hrw.org/reports/2007/tunisia0907/; Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States* (2007), *available at* http://www.hrw.org/reports/2007/russia0307/.

Respondents also failed to present any evidence contesting Petitioner's individualized risk of torture or provide any information concerning diplomatic assurances obtained from Qadhafi regarding the protection of Petitioner specifically. Instead, throughout this case, Respondents have relied upon two generic declarations from former U.S. officials – former Ambassador Pierre-Richard Prosper and former Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman – that describe the broad policy of the United States towards the international transfer of detainees from Guantanamo to the custody of another country.

C. The District Court and Court of Appeals Rulings

On February 20, 2007 – prior to Petitioner filing his motion for a preliminary injunction but after he received notice in December 2006 of his impending transfer – the court of appeals ruled in the *Boumediene*, that the MCA applies to detainees with pending habeas petitions and that the statute's removal of jurisdiction over the petitioners' habeas petitions and non-habeas statutory and treaty claims did not violate the Suspension Clause. This Court denied certiorari in *Boumediene* on April 2, 2007, 127 S. Ct. 1725 (2007).

Subsequently, on April 19, 2007, the district court denied Petitioner's motion for an injunction prohibiting the government from transferring him to the custody of Libyan officials for continued detention. App. 4a-6a. The court recognized "the seriousness of the petitioner's allegations," but found that it had "no choice but to deny the motion for a preliminary injunction" in light of the court of appeals decision in *Boumediene*. *Id.* 4a. The court found itself bound by the D.C. Circuit's statement in *Boumediene*, 476 F.3d at 986 n.1, that "[s]ection 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require

dismissal even of pending non-habeas claims." The court also noted that "'precedent in this circuit also forecloses the detainees' claims to constitutional rights.'" *Id.* 5a (quoting *Boumediene*, 476 F.3d at 992). Petitioner appealed and moved for an emergency stay of transfer.

On April 23, 2007, the court of appeals issued an administrative injunction to afford sufficient opportunity for consideration of the merits of Petitioner's emergency motion for injunctive relief. Petitioner sought to preserve the status quo pending the court's consideration of his appeal of the district court's order. After briefing was completed, the court of appeals denied Petitioner's motion and ordered his case dismissed for lack of subject matter jurisdiction, citing *Boumediene* and *Kiyemba v. Bush*, Nos. 05-5487, 2007 WL 964612 (D.C. Cir. Mar. 22, 2007).

On May 1, 2007, this Court denied Petitioner's application (06A1005) for an original writ of injunction pending the filing of his petition for a writ of certiorari.

After the rulings in Petitioner's appeal, on June 20, 2007, the D.C. Circuit denied motions of the *Boumediene* and *Al Odah* petitioners to stay the mandate in those consolidated cases. Order, *Boumediene v. Bush*, Nos. 05-5062 & 05-5063 (D.C. Cir. June 20, 2007). Pursuant to Federal Rule of Appellate Procedure 41, the mandate issued on June 27, 2007.

Petitioner's time for filing a motion for rehearing or rehearing *en banc* expired on June 11, 2007. Fed. R. App. P. 41. On June 27, 2007, the court of appeals issued its mandate in Petitioner's case. Two days later, in *Boumediene* and *Al Odah*, this Court granted a petition for rehearing, vacated its April 2, 2007 denial of petitions for writs of certiorari, and granted certiorari. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (No. 06-1195); *Al Odah v. United States*, 127 S. Ct. 3067 (2007) (No. 06-1196). The court of appeals also granted a motion to recall the mandate in *Kiyemba*.

Order, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Sept. 7, 2007).

On July 25, 2007, Petitioner filed in the court of appeals an out-of-time Motion to Recall the Mandate and Petition for Panel Rehearing or Rehearing *En Banc* in light of this Court's grant of certiorari in *Boumediene* and *Al Odah*. The court of appeals has not acted upon Petitioner's motion. [11]

D. The Pending Appeal in *Boumediene v. Bush* and *Al Odah v. United States*

The questions presented in the consolidated *Boumediene* and *Al Odah* appeal include whether the MCA validly stripped federal court jurisdiction over habeas corpus petitions filed by Guantanamo detainees and whether the detainees are entitled to the protections of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions. But the *Boumediene* appeal does not directly address the present questions: (1) whether the MCA impermissibly eliminates federal court jurisdiction arising under 28 U.S.C. § 1331 for nonhabeas constitutional claims and, if so, (2) what legal standards govern the Executive's attempt to transfer a Guantanamo detainee to the custody of a foreign government where he is more likely than not to be tortured or persecuted.

REASONS FOR GRANTING THE PETITION

The Court is presently considering in the *Boumediene* and *Al Odah* cases whether Guantanamo detainees, including Petitioner, have a right to habeas corpus that is protected by the Suspension Clause of the Constitution. If the Court concludes that Guantanamo detainees have such a

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[11] Petitioner's petition for a writ of certiorari is ripe for consideration. SUP. CT. R. 13. Further, on the eve of filing this Petition for a Writ of Certiorari, the district court dismissed Petitioner's habeas case, citing the court of appeals opinion in *Boumediene*. Memorandum Order, *Zalita v. Bush*, Civil Action No. 05-1220 (D.D.C. Sept. 20, 2007) (dkt. no. 62).

right, Petitioner unquestionably would be entitled to challenge his anticipated transfer to Libya as a violation of the Due Process Clause of the Fifth Amendment to the Constitution and as a violation of international law, including the Convention Against Torture. This Court, therefore, should grant Petitioner's petition and hold his case in abeyance pending its decision in *Al Odah* and *Boumediene* in order to allow Petitioner the benefit of any decision by the Court that Guantanamo detainees are entitled to certain fundamental rights. Absent a grant of certiorari and an order holding this case in abeyance, Petitioner will likely be transferred to Libya to face torture and persecution.

Also at the heart of this petition is the question of whether the Executive can continue to shield its lawless conduct at Guantanamo from judicial and public scrutiny. The D.C. Circuit ruling sanctions Respondents' assertion of unlimited Executive authority to transfer detainees from Guantanamo to foreign regimes, such as Libya, with well-documented histories of routinely torturing, persecuting and summarily executing members of political opposition or disfavored religious groups.

In so doing, the court of appeals' reasoning contradicts this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), concerning the nature of Guantanamo as an area subject to the exclusive jurisdiction and control of the United States in which noncitizens are entitled to fundamental protections, including due process. The court failed to recognize that, under this Court's precedent, the detainees have constitutional and treaty-based rights not to be transferred to a country where they are more likely than not to be tortured or persecuted. Consequently, the court did not consider adequately the MCA's constitutionality in the context of separation of powers principles. Rather, the ruling disrupts the balance of constitutional powers, dangerously undermining the Judiciary's ability to constrain the abuse of Executive authority and to safeguard the rule of law.

For these reasons, the Court should grant the petition for certiorari in this case and resolve these important constitutional questions or, alternatively, hold this case in abeyance to preserve the status quo pending the resolution of *Boumediene*.

I. *RASUL* AND THE MCA'S VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS COMPEL REVERSAL OF THE COURT OF APPEALS JUDGMENT.

A. The Court of Appeals Ignored This Court's Holding that Guantanamo Detainees Are Imprisoned Within U.S. Territorial Jurisdiction and that Noncitizens Within Such Territory Have Fundamental Constitutional Protections.

The D.C. Circuit's summary dismissal – and reliance upon its earlier decision in *Boumediene* – cannot be reconciled with this Court's opinion in *Rasul*, and earlier cases addressing the constitutional protections of noncitizens within the exclusive jurisdiction and control of the United States.

This Court held in *Rasul* over four years ago that as a location under the "complete jurisdiction and control" of the United States, Guantanamo is within "the territorial jurisdiction" of the United States. *Rasul*, 542 U.S. at 480. Justice Kennedy further explained in his concurrence in *Rasul*: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a space that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487 (Kennedy, J., concurring). Just as it erred in *Boumediene* with respect to the detainees' right to habeas review, the court of appeals in the present case ignored the conclusion required by *Rasul*: that the Guantanamo detainees are within the territorial

jurisdiction of the United States for purposes of determining their due process rights and treaty-based protections.

In addition to contradicting this conclusion in *Rasul*, the D.C. Circuit ruling rejects this Court's earlier precedent determining that noncitizens within the territorial jurisdiction of the United States are entitled to fundamental constitutional protections, including due process safeguards. In *Rasul*, this Court found that Guantanamo was not "extraterritorial," 542 U.S. at 480, but rather falls within the territorial jurisdiction of the United States. It is well-established by this Court that fundamental constitutional protections apply to "all persons within the territorial jurisdiction" of the United States. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the Due Process Clause of the Fourteenth Amendment protects "all persons within the territorial jurisdiction" of the United States); *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2681-82 (2006). The court of appeals failed to account for this settled law.

Moreover, in *Rasul*, the Court reaffirmed that detainees in Guantanamo are entitled to fundamental rights under the reasoning of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), stating that:

> Petitioners' allegations – that, although they have engaged neither in combat nor acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Rasul, 542 U.S. at 483 n.15 (citing *Verdugo-Urquidez*, 494 U.S. at 277-278 (Kennedy, J., concurring) and cases cited therein, including *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), and the *Insular Cases*[12]).

This Court first addressed the application of constitutional rights to persons in U.S. territories in the *Insular Cases*, holding that "fundamental rights," including due process rights, could not be denied to individuals in unincorporated territories under the control of the United States. In a subsequent case applying the fundamental rights analysis, *Ralpho*, the court found that Micronesia was an area over which the United States was not technically "sovereign." Nevertheless, the court held that an individual in Micronesia still had rights under the Due Process Clause because due process was a "fundamental right" with respect to property and that "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" *Ralpho*, 569 F.2d at 618-19 (quoting *Calero-Toledo v. Pearson Yacht Leasing, Co.*, 416 U.S. 663, 669 n.5 (1974)).

More recently, *Verdugo-Urquidez* made clear that noncitizens are not entitled "to Fifth Amendment rights outside the sovereign territory of the United States," but reaffirmed the "fundamental rights" approach for territories under U.S. control. 494 U.S. at 268-69. Justice Kennedy's concurrence further considered whether adherence to constitutional rights outside the sovereign United States would be "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring). As Justice Frankfurter explained in *Reid v. Covert*, the idea that the Constitution applies only in lands over which the United States flag flies "has long since evaporated. Government action abroad is performed

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[12] *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 195 U.S. 138 (1904).

both under the authority and the restrictions of the Constitution." 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring). The D.C. Circuit ruling contradicts this precedent.

Unquestionably, the right Petitioner asserts here – the right to not be transferred forcibly to a country more likely than not to torture or persecute him – is a fundamental right that applies wherever the jurisdiction of the United States extends. *See also Balzac*, 258 U.S. at 312-13 ("The guarantees of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico . . . .").

Finally, the D.C. Circuit Court also paid no heed to *Rasul's* careful distinguishing of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and that portion of *Verdugo-Urquidez* involving the inapplicability of the Fifth Amendment to noncitizens in another country's sovereign territory. *Rasul*, 542 U.S. at 475-481.[13] Instead, in rejecting Petitioner's assertion of due process rights, the court of appeals relied upon its erroneous conclusion in *Boumediene* that *Eisentrager* governs the determination of the detainees' rights. The D.C. Circuit's ruling cannot be squared with *Rasul* and should be reversed.

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[13] This Court explained that, unlike the petitioners in *Eisentrager*, in *Rasul*, the petitioners were not citizens of countries at war with the United States, denied that they engaged in or plotted hostilities against the United States, were never given access to a tribunal, charged or convicted of any offense, and spent more than two years imprisoned in territory within the United States' exclusive jurisdiction and control. *Rasul*, 542 U.S. at 476. Justice Kennedy further distinguished the circumstances in *Eisentrager* "in two critical ways," because Guantanamo is "in every practical respect a United States territory," and because the detainees were imprisoned indefinitely and lacked "any legal proceeding to determine their status." *Id.* at 487-88 (Kennedy, J., concurring).

The court of appeals judgment eliminates any judicial restraint over the Executive's unilateral assertion of transfer authority. With respect to Petitioner, it would permit the Executive to continue operating without accountability when it forcibly transfers detainees in the dead of the night and without any public transparency from Guantanamo to the custody of foreign governments, who may quietly shuffle the man away from the public's view. In all other contexts, the Executive's international transfer of a person within U.S. custody is subject to legal restraints and, at a minimum, limited judicial review that guarantees that no person shall be forcibly or secretively transferred to a country where he or she is more likely than not to be tortured or persecuted.[14] This legal *nonrefoulement* obligation is mandatory and absolute.[15] Yet, the D.C. Circuit lets stand the Executive's claim that nothing more than "policy" guides the transfer of detainees from Guantanamo to the custody of foreign governments, including the Qadhafi regime.

Moreover, the court of appeals decision confers unlimited authority upon the Executive with implications far beyond this case. Unreviewable and unrestrained transfer

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[14]Section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. 105-277, 112 Stat. 2681, 2681-821 (1998), is the statute implementing the protections of the CAT. Section 2242(d) requires all "appropriate agencies" engaged in the international transfer of individuals in their custody to promulgate regulations implementing Article 3 of the CAT, which prohibits *refoulement*. Both the Department of Justice and the Department of Homeland Security have issued regulations under § 2242(d). *See* 8 C.F.R. § 208.16-208.18 (2006); 22 C.F.R. § 95.2 (2005). The implementation of these regulations has been subject to judicial review, despite the government's assertion that judicial review would interfere with the functions of the Executive Branch. *See, e.g., Silva-Rengifo v. Attorney General of the United States*, 473 F.3d 58 (3rd Cir. 2007). As an agency engaged in the international transfer of detainees, the Department of Defense also must, but has failed to, issue the regulations mandated by statute.

[15] "*Refoulement*" is a country's expulsion or return of an individual to another country where the person is in danger of torture or persecution.

power enables the Executive to maintain a system of proxy detention that is wholly outside the rule of law. Despite the "policy" assertions by Respondents, the Executive now wields the power to establish proxy detention in foreign countries, with U.S. intelligence or law enforcement officials continuing to maintain access to prisoners and obtain information from interrogations by foreign government officials who routinely use torture or persecution. Nothing in the court of appeals ruling prevents such Executive lawlessness.

For these reasons, the D.C. Circuit ruling must be reversed.

B. The MCA Violates Separation of Powers

Section 7 of the MCA provides that "no court, justice, or judge shall have jurisdiction to hear or consider any . . . action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien" in U.S. detention who has been determined to be "an enemy combatant or is awaiting such determination." MCA § 7(a). In *Boumediene*, the court of appeals decided that the detainees lack a constitutional right to habeas review and concluded without discussion that § 7(a) of the MCA also removes federal jurisdiction over their nonhabeas claims. *Boumediene*, 476 F.3d at 98 n.1.[16] Those nonhabeas claims specifically

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[16] Although the MCA incorporates the limited grant of jurisdiction to the D.C. Circuit under the DTA, this grant is insufficient to overcome the constitutional defect and categorically prohibits any claim by individuals, such as Petitioner, challenging Respondents' efforts to forcibly transfer them to countries such as Libya. In *Khalifh v. Gates*, a petition for review brought under the DTA, the D.C. Circuit ruled that it could not consider an emergency injunction pending review to prevent a forcible transfer of a Guantanamo detainee to Libya. Order, *Khalifh v. Gates*, No. 07-1215 (D.C. Cir. June 22, 2007). The court in *Khalifh* stated that it lacked jurisdiction under the MCA and DTA to grant the requested relief. *Id.*

The inability to invoke the All Writs Act, 28 U.S.C. § 1651, in a DTA proceeding and to obtain an injunction preventing a petitioner's

included violations of the Administrative Procedures Act of 1946, 5 U.S.C. § 500 *et seq.*, and the Alien Tort Statute, 28 U.S.C. § 1350. However, because the court in *Boumediene* found that the Constitution did not protect the petitioners, it did not consider whether § 7 unconstitutionally deprives a federal court of jurisdiction over a due process challenge brought directly under the Fifth Amendment and under treaties to prevent a detainee from being transferred to a country where he is more likely than not to be subject to torture or persecution.

In this case, the court of appeals was, for the first time, presented squarely with this question. But rather than addressing that issue, the court of appeals summarily relied upon its decision in *Boumediene* that the detainees lack constitutional rights to deny Petitioner's nonhabeas claims. The D.C. Circuit failed to assess whether the MCA is an unconstitutional violation of separation of powers by depriving federal courts of judicial review of claims, like those of Petitioner, that arise directly under the Constitution and treaties of the United States. Further, the D.C. Circuit has not reconsidered its dismissal in Petitioner's case in light of this Court's grant of certiorari in *Boumediene* or the nature of Petitioner's claims brought under 28 U.S.C. § 1331.

Under the reasoning of the court of appeals, § 7 of the MCA impermissibly precludes *all* federal court jurisdiction over Petitioner's claims arising directly under the Fifth Amendment and treaties of the United States, specifically the CAT and the 1951 Refugee Convention, and brought pursuant to jurisdiction under 28 U.S.C. § 1331 rather than in habeas. If not reversed, the court of appeals ruling deprives Petitioner of any federal forum for his

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transfer pending review of the merits of his case is a further example of the inadequacy of the DTA review mechanism as a substitute for habeas, which is one of the questions under review in *Boumediene* and *Al Odah*. *See Swain v. Pressley*, 430 U.S. 372 (1977).

constitutional claims and abrogates this Court's historic constitutional function to interpret and enforce treaties of the United States.

Petitioner is not appealing a final decision of a CSRT pursuant to the limited review procedures available under the DTA. Rather, he seeks to enjoin the Executive's attempt to transfer him to a dictatorship more likely than not to torture or persecute him. Because the MCA entirely eliminates jurisdiction over Petitioner's substantive and procedural constitutional due process claims, it is an invalid exercise of Congress's power to regulate the federal courts' jurisdiction set forth in Article III.

Contrary to the D.C. Circuit's ruling, Congress may not exercise its power to control federal court jurisdiction in a manner that deprives any person of life, liberty, or property without due process of law. *United States v. Bitty*, 208 U.S. 393, 399–400 (1908) (noting that Congress may make "exceptions and regulations" to the Supreme Court's appellate jurisdiction, provided it exercises "due regard to all the provisions of the Constitution"); *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1342 (D.C. Cir. 1975) (stating that this principle is "well established"); *see also Oestereich v. Selective Serv. Sys. Local Bd. No. 14*, 393 U.S. 233, 244 n.6 (1968) (Harlan, J., concurring) ("[I]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent to adjudicate his claims."). Due process is denied whenever there is no forum—federal, state, or agency—for the resolution of a federal constitutional claim. *Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987); *see also Dalton v. Specter*, 511 U.S. 462, 469 (1994) (suggesting that Congress may not prevent all federal court review of constitutional claims); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (noting the strong presumption in favor of judicial review even when an administrative forum is available). If one effect of a statute is

to deprive an individual of due process, the statute is invalid and must be struck down. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); *see also Bartlett*, 816 F.2d at 706.

Similarly, the MCA's removal of all federal court jurisdiction to consider Petitioner's treaty-based claims is an unconstitutional encroachment upon the traditional purview of the Judiciary to render a final interpretation of treaties. As noted above, § 7 broadly strips federal court jurisdiction over "any" claim that could be brought by someone designated as an "enemy combatant," except for limited review of a final decision of a CSRT or military commission. Section 7 of the MCA eliminates federal court jurisdiction over Petitioner's claims arising under the CAT, the 1951 Refugee Convention and its 1967 Protocol. Although Congress has the power to restrict federal court jurisdiction, *see* U.S. Const. art. III, § 2, cl. 2, that power is limited. By denying litigants the power to invoke these treaties, Congress effectively denies courts the power to interpret these treaties as a rule of decision, in violation of fundamental separation of powers principles. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Article III of the Constitution makes clear that it is the duty of the courts to interpret the international laws and treaties which bind the United States. U.S. Const. art. III, § 2, cl. 1 (providing that "the judicial power" extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"). This Court consistently has affirmed the power of Article III courts to interpret treaties. This is true whenever a treaty provides the rule of decision in a case, whether because the treaty serves as a defense to the action, *see, e.g., United States v. Rauscher*, 119 U.S. 407 (1886), or as the source of right for a common law action, *see, e.g., Harden v. Fisher*, 14 U.S. (1 Wheat.) 300 (1816). That treaty interpretation is a core

judicial function is illustrated by the fact that courts have been the final arbiters of treaty interpretation for over 200 years. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

This Court has also made clear that while the political branches may "interpret" treaties in the course of implementing and enforcing them, the Judiciary is the ultimate arbiter of the meaning of a treaty. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961). This issue most frequently arises with respect to Executive Branch interpretation of treaties. In those cases, the Court has said that while courts will carefully consider "the meaning given them by the departments of government particularly charged with their negotiation and enforcement," the court ultimately will interpret treaties for itself. *Id.* at 194. Applying this principle, the Court has rejected the relevant Executive Branch interpretation of a treaty on multiple occasions.[17]

The Court has also given deference to congressional interpretation of treaties in some circumstances, but again has asserted its authority as the ultimate arbiter of treaty law. *See, e.g., Foster v. Neilson*, 27 U.S. 253 (1829). Any deference given to Congress' interpretation of a treaty should be no greater, and perhaps even less, than the limited deference the Court gives to the Executive Branch. The dearth of caselaw also indicates that deference to congressional interpretation may be limited to determinations of whether a treaty is self-executing—that is, in the words of *Foster*, whether "the terms of the stipulation import a contract," directing it to the political branches to execute the contract. Under this reading, the Court does not owe deference to Congress with respect to provisions in

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[17] *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (rejecting Executive's interpretation of Geneva Convention provision and, pursuant to its Article III authority, applying the Court's interpretation); *Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting the Secretary of State's interpretation of a treaty and applying the Court's interpretation); *United States v. Rauscher*, 119 U.S. 407 (1886) (same).

treaties (such as the prohibition on *refoulement* in the CAT and 1951 Refugee Convention) that do not direct that the state do something such as enact a law but merely require that the state refrain from doing something in violation of the individual right protected in the treaty. Thus, the federal courts have the authority under Article III to make final interpretations of treaties. The D.C. Circuit's ruling disregards this Court's precedent and fails to safeguard the constitutional role of federal courts.

II. THIS COURT SHOULD ALSO GRANT REVIEW TO CLARIFY THAT DUE PROCESS AND TREATY PROTECTIONS PROHIBIT PETITIONER'S TRANSFER TO LIBYA.

This Court should also grant certiorari to clarify the substantive standards governing the Executive's attempt to transfer forcibly Guantanamo detainees to the custody of a foreign government without any legal process affording the transferee an opportunity to raise a claim that he is more likely than not to be tortured or persecuted by that country.

A. These Questions Require Urgent Guidance From This Court.

Petitioner's appeal is the Court's first opportunity to address this issue within the Guantanamo context and is ripe for the Court's consideration. A limited number of detainees at Guantanamo face the threat of what is, in essence, a rendition to torture, but the risk to these men is grave.[18] The Executive seeks to transfer these men to the custody of foreign government, regardless of the abusive treatment they face there and where U.S. personnel may continue to have access to them for intelligence purposes, but where the

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[18] *See* Human Rights Watch, Press Release, *U.S.: Don't Send Guantanamo Detainees Home to Torture and Abuse* (Sept. 5, 2007), *available at* http://hrw.org/english/docs/2007/09/05/tunisi16792.htm (stating that approximately 50 detainees at Guantanamo come from countries with known records of torture, including Algeria, China, Libya, Tunisia, and Uzbekistan).

detainees are more likely than not to undergo torture interrogation or persecution. Relying solely on discretionary, nonbinding policy pronouncements, mostly announced in the context of litigation, the Executive eschews any legal constraints on its transfer authority and seeks to remove the detainees from Guantanamo outside of traditional extradition or removal proceedings, which would prohibit *refoulement* even for individuals convicted of acts of terrorism. Such unprecedented Executive authority has not been condoned, even when convicted terrorists are transferred from this country.[19]

Indicative of the seriousness of these issues, on April 27, 2007, the Special Immigration Appeals Commission (SIAC) in the United Kingdom, a court that hears appeals against deportation on national security grounds, ruled, for the first time, that the Prime Minister could not transfer terrorism suspects from the U.K. to the custody of Libyan authorities because of precisely the same risk of torture and other abuses as those raised by Petitioner. *See DD v. Secretary of State of the Home Department*, Appeal No: SC/42 and 50/2005, Apr. 27, 2007. In considering the national security and diplomatic issues, as well as the Qadhafi regime's well-documented record of extensive use of torture, the SIAC held that the U.K.'s international and domestic obligations prohibited it from forcibly transferring suspects to countries where the individuals faced a significant risk of torture and other harms.

Petitioner respectfully submits that this Court should take cognizance of this analysis and provide guidance at this time concerning the appropriate legal restraints upon Executive transfer authority and remand for prompt consideration of the merits of Petitioner's challenge to his

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[19] Even noncitizens who have "engaged in terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2000), have a right to have their individualized CAT claims assessed prior to their removal from the United States. *See* 8 C.F.R. § 208.18(d) (2006).

transfer to Libyan authorities. Absent reversal by this Court, the D.C. Circuit's ruling allows the Executive to flout prohibitions against torture and our country's mandatory *nonrefoulement* obligations. Moreover, any delay of the resolution of Petitioner's challenge may result in his forcible transfer to torture in Libya or years of ongoing, unjustified detention in Guantanamo while the United States refuses to relocate him to a safe third country.[20]

B. The Executive's Actions Violate Petitioner's Fundamental Due Process and Treaty Protections From Torture and Persecution.

The court of appeals ruling in Petitioner's case was contrary to this Court's precedent for at least four reasons.

First, the Executive's conduct is an unprecedented attempt to engage in international transfers of noncitizen detainees without any judicial oversight. As this Court set forth in *Youngstown Co. v. Sawyer*, 343 U.S. 585, 579 (1952), Executive power must flow from an act of Congress or the Constitution itself. Here, the Executive has cited no statutory authority that authorizes the challenged action.[21] Rather, Respondents have asserted that the Executive Branch is "constitutionally vested with the authority to both

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[20] Petitioner has been eligible for transfer out of Guantanamo since at least December 2006, and has requested family reunification with his wife and child in Afghanistan. He is actively pursuing this avenue of relief with the Ministry of Justice in Afghanistan. Yet, the U.S. government has refused to negotiate with Petitioner and his counsel about any issues concerning the country to which he should be transferred. Despite this potentially viable alternative country of refuge, Petitioner continues to languish at Guantanamo and Respondents maintain that as of April 21, 2007, the Executive is free to transfer Petitioner to Libya.

[21] Moreover, Congress has set forth an absolute obligation for the Executive to promulgate regulations in compliance with this country's obligation under the CAT. *See* FARRA § 2242(b) (providing that "the heads of the appropriate agencies *shall* prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture") (emphasis added).

conduct military functions such as detention of enemy combatants for the duration of hostilities and to engage in foreign relations, to act without undue intrusion within its constitutional sphere of responsibility."[22] But as this Court explicitly clarified in *Hamdi v. Rumsfeld*, "a state of war is not a blank check for the President." 542 U.S. 507, 536 (2004) (plurality opinion). Nothing in the Constitution authorizes the Executive to unlawfully seize a civilian from a zone of peace, place him in military custody and then forcibly transfer him from U.S. military custody to the custody of foreign government officials in violation of U.S. law and treaties. Just as this Court will clarify in *Boumediene* the existing constitutional restraints upon Executive authority to detain noncitizens, so, too, is this Court's guidance needed concerning the applicable law governing the Executive's transfer of detainees to foreign human rights abusing regimes.

Second, the court of appeals disregarded this Court's reasoning in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court held that under normal circumstances, the government does not have an affirmative obligation to protect persons from harm caused by third parties. This Court concluded, however, that the Fifth Amendment may afford protection from harm by third parties when officials affirmatively act to increase or create the danger that may ultimately result in the individual's harm. Following *DeShaney*, every circuit court has adopted the "state-created danger rule" suggested in *DeShaney* as a basis for a substantive due process violation.[23]

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[22] Resp. Opp. to Mot. for TRO and Preliminary Inj., *Zalita v. Bush*, Civil Action No. 05-1220, at 17-18 (D.D.C. Apr. 16, 2007) (dkt. no. 45).

[23] *See Butera v. District of Columbia*, 235 F.3d 637, 649 n 10 (D.C. Cir. 2001) (collecting cases from every circuit).

Despite this recognized doctrine, the D.C. Circuit failed to consider that Respondents' effort to transfer Petitioner to Libya for ongoing detention and torture involves affirmative acts invoking due process concerns, rather than the simple inaction of standing by idly as third parties injure an individual. Prior to the Defense Department's actions, Petitioner remained in relative safety in Pakistan with his family, secure beyond the reach of Libyan officials. Like hundreds of Libyan citizens fleeing the Qadhafi dictatorship, he would have had the opportunity to apply for asylum in a third country if Libyan authorities attempted to seek his forced return. Yet, the Executive is now poised to render him to the custody of the Libyan dictatorship and do so without affording him any opportunity to raise objections to his *refoulement*. Moreover, the Executive seeks to transfer Petitioner after describing him to the Libyan government as an "enemy combatant" and a member of a political opposition group heavily persecuted by Qadhafi.[24] Respondents are affirmatively exercising their authority to place Petitioner in circumstances in which he is more likely than not to face danger and that the state-created danger theory was intended to forestall. The court of appeals ruling ignores this settled precedent.

Third, the court of appeals disregarded this Court's reasoning in *Rasul* and *Hamdi* that the detainees in Guantanamo, "no less than American citizens," were entitled to due process protections. *See Rasul*, 542 U.S. at 481; *Hamdi*, 542 U.S. at 533-35 (plurality opinion) (holding that a citizen detained after capture on a battlefield during an armed conflict is entitled to due process protections). Contrary to the D.C. Circuit's summary dismissal, the Executive's actions would deprive Petitioner of his absolute

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[24] Petitioner has never had an opportunity to challenge the merits of these allegations in federal court or any other proceeding affording him fundamental due process and, further, he adamantly denies the allegations.

right to *nonrefoulement* protection and avoiding torture, persecution or extrajudicial execution – interests in life and liberty that are unquestionably amongst the strongest private interests protected by procedural due process.

Fourth, the court of appeals' failure to consider the merits of Petitioner's challenge permits the Executive to transfer Petitioner to Libyan custody in violation of his right to protection from torture and *refoulement* derived from the CAT,[25] the 1951 Refugee Convention,[26] and the domestic laws implementing these instruments.

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[25] Article 3 of the CAT imposes an absolute *nonrefoulement* duty upon contracting States from "expel[ling], return[ing] (*'refouler'*) or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Congress implemented the protections and duties embodied in Article 3 into U.S. domestic law through FARRA, Pub. L. 105-277, 112 Stat. 2681, 2681-821 (1998), which sets forth both a policy statement, §2242(a), as well as a regulatory mandate for any agency involved in the international transfer of individuals, §2242(b).

[26] Similarly, under Article 33(1) of the 1951 Refugee Convention, contracting States may not "expel or return...a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." No reservations to Article 33 are permitted under both the Convention and Protocol. 1967 Refugee Protocol art. VII; 1951 Refugee Convention art. 42.1. Congress implemented the protections of Article 33 in domestic law through 8 U.S.C. § 1231(b)(3), explicitly to comply with the United States' international obligations. 8 U.S.C. § 1231(b)(3) (2000). This provision prohibits the Attorney General from removing, excluding or deporting any noncitizen, such as Petitioner, to a country where his "life or freedom would be threatened." *Id.* Because the *nonrefoulement* protections of both Article 3 of the CAT and Article 33 of the 1951 Refugee Convention and its 1967 Protocol have been implemented in the United States through domestic legislation, the question of whether these treaty provisions are self-executing or non-self-executing is irrelevant.

Further, even assuming that Petitioner is properly within military jurisdiction and custody – a proposition that he disputes as a civilian seized far from any battlefield – the principle of *nonrefoulement*, and the

III. THE ISSUES PRESENTED IN THIS CASE ARE OF SIGNIFICANT NATIONAL IMPORTANCE.

The D.C. Circuit's ruling has profound implications for the detainees at Guantanamo at risk of a forcible transfer to a country more likely than not to torture or persecute them. It also significantly erodes our nation's commitment to the rule of law, and more specifically, the commitment of civilized nations to an absolute prohibition against torture and persecution. The court of appeals found that, in the context of Guantanamo, no law restrains the Executive's exercise of transfer authority over foreign citizen detainees, effectively permitting unrestrained ongoing international transfers with a very real probability of torture and persecution. The sanctioning of lawless Executive action, unchecked by constitutionally required judicial restraints, warrants review by this Court.

Further, paramount humanitarian concerns are raised by the Executive's tolerance of, or even complicity in, torture interrogation by foreign nations of suspects delivered into their custody by U.S. officials. The court of appeals ruling creates an urgent, ongoing risk of detainees being transferred under circumstances that violate fundamental constitutional and treaty-based protections and place their lives at risk. Such matters warrant prompt guidance from this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the D.C. Circuit Court of Appeals.

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protection afforded to persons who fear torture or persecution upon return, are also embodied in Common Article 3 of the Geneva Conventions. *See* Sir Elihu Lauterpacht QC & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 178 (Erika Feller, et al., eds., UNHCR & Cambridge Univ. Press, 2003.

Respectfully submitted,

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SEPTEMBER 21, 2007

APPENDIX

APPENDIX A

2007 U.S. App. LEXIS 9975

United States Court of Appeals
For the District of Columbia

No. 07-5129 **September Term, 2006**
Filed on: April 25, 2007

Abu Abdul Rauf Zalita,
Appellant

v.

George W. Bush,
Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the emergency motion for injunctive relief and the response thereto, it is

ORDERED that the motion be denied and the case be dismissed for lack of subject matter jurisdiction. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007);

Kiyemba v. Bush, Nos. 05-5487, et al., 2007 WL 964612 (D.C. Cir. Mar. 22, 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

2007 U.S. Dist. LEXIS 28951

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABU ABDUL RAUF ZALITA,	)	
Petitioner/Plaintiff	)	**Civil Action No.:**
v.	)	**05-1220 (RMU)**
	)	
GEORGE W. BUSH et al.,	)	**Document No.: 44**
Respondents/Defendants.	)	
	)	

MEMORANDUM ORDER

DENYING THE PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

This matter comes before the court on the petitioner's motion for a temporary restraining order ("TRO") preventing the respondents from transferring him from the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") to the custody of the Libyan government for continued detention. Mem. In Supp. of Pet'r's Mot. for a Prelim. Inj. Prohibiting Unlawful Rendition to Torture ("Pet'r's Mot."). The petitioner

contends that a transfer to Libya "is more likely than not to lead to [his] persecution, torture, or extrajudicial killing at the hands of Libyan officials." *Id.* at 17. Although the court recognizes the seriousness of the petitioner's allegations, it has no choice but to deny the motion for a preliminary injunction.

Section 7(b) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), strips this court of jurisdiction to hear the petitioner's habeas claims and section 7(a) strips this court of jurisdiction to hear the petitioner's non-habeas claims. MCA § 7(b). In particular, section 7(a) of the MCA states that "no court, justice, or judge shall have jurisdiction to hear or consider any [] action relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien, like the petitioner, who has been classified as an enemy combatant. In the case *Boumediene v. Bush*, 476 F.3d 981 (2007), the D.C. Circuit held that section 7(b) of the MCA was not an unconstitutional suspension of the writ of habeas corpus.

The petitioner argues that the court has jurisdiction to hear his non-habeas claims (that is, his motion for an order enjoining his transfer to Libya) by noting that the D.C. Circuit's *Boumediene* decision only addressed the constitutionality of section 7(b) of the MCA. The petitioner, however, ignores the D.C. Circuit's statement, in *Boumediene*, that "[s]ection 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims." *Boumediene*, 476 F.3d at 98 [sic], n.1. Later in that same opinion, the court states: "Section 7(a) strips jurisdiction over detainee cases, including habeas cases, and section 7(b) makes section 7(a) applicable to pending cases." *Id.* at 988. And, contrary

to the petitioner's argument that the MCA is unconstitutional because it eliminates the court's jurisdiction over his due process claims, Pet'r's Mot. at 34, "precedent in this circuit also forecloses the detainees' claims to constitutional rights," *Boumediene*, 476 F.3d at 992.

Accordingly, it is this 19th day of April, 2007 hereby

ORDERED that the petitioner's motion for a preliminary injunction is **DENIED**.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

APPENDIX C

Detainee Treatment Act of 2005, § 1005(e), Pub. L. No. 109-148, 119 Stat. 2680, 2741-43

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

* * *

(e) Judicial Review of Detention of Enemy Combatants-

(1) IN GENERAL- Section 2241 of title 28, United States Code, is amended by adding at the end the following:

'(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider--

'(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

'(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who--

'(A) is currently in military custody; or

'(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'.

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION-

(A) IN GENERAL- Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY- The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

* * *

APPENDIX D

Military Commissions Act of 2006, § 7, Pub. L. No. 109-366, 120 Stat. 2600, 2636

SEC. 7. HABEAS CORPUS MATTERS.

(a) In General.--Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

'e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

'(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'.

(b) Effective Date The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

FILED
DEC 7 - 2007

(2)

No. 07-416

In the Supreme Court of the United States

ABU ABDUL RAUF ZALITA, PETITIONER

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, notwithstanding the express terms of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, the district court had jurisdiction to enter an injunction barring petitioner—an alien detained as an enemy combatant at Guantanamo Bay—from being released from United States custody and returned to his home country.

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In the Supreme Court of the United States

No. 07-416

ABU ABDUL RAUF ZALITA, PETITIONER

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the district court (Pet. App. 3a-5a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2007. On July 18, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Libyan citizen who is detained as an enemy combatant at the United States Naval Base at

Guantanamo Bay, Cuba. Petitioner has been given a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT), and the CSRT determined that he is an enemy combatant because he is "a member of, or affiliated with al Qaida, the Taliban, and associated forces that are engaged in hostilities against the United States." Factual Return to Pet. for Writ of Habeas Corpus Exh. A, encl. 1, at 1. Unclassified evidence presented to the CSRT indicated that petitioner was a member of the Libyan Islamic Fighting Group, a known terrorist organization. *Ibid.* He received weapons training from that group, traveled to Tora Bora in December 2001, and then fled to Pakistan, where he was captured. *Ibid.* The CSRT's conclusion was further supported by classified material. *Ibid.*

2. In June 2005, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. On December 8, 2006, the Department of Defense gave petitioner 30 days' notice that it intended to transfer him out of United States custody and return him to his home country of Libya. Petitioner then sought and obtained an injunction prohibiting the planned transfer absent an additional 60 days' notice. Minute Order (Feb. 15, 2007). On February 20, 2007, in compliance with that order, respondents provided the additional 60 days' re-notice of transfer. Thereafter, petitioner asked the district court to enjoin the planned transfer altogether.

3. The district court denied the motion for an injunction. Pet. App. 3a-5a. It relied on *Boumediene* v. *Bush*, 476 F.3d 981, 988 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007), in which the court of appeals held that Section 7 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2635, divests the district

courts of jurisdiction over habeas petitions filed by Guantanamo Bay detainees. In addition, the court explained, *Boumediene* held "that '[s]ection 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants.'" Pet. App. 4a (brackets in original) (quoting *Boumediene*, 476 F.3d at 986 n.1).

Petitioner appealed the district court's denial of his motion for injunctive relief and concurrently sought from the district court an injunction barring his transfer during the pendency of his appeal. The district court denied that relief, but on Friday, April 20, 2007, it granted petitioner a temporary injunction barring his transfer until Monday, April 23, 2007, so that the court of appeals could consider petitioner's motion for an injunction barring his transfer pending consideration of his appeal. Minute Order (Apr. 20, 2007). On April 23, the court of appeals issued an "administrative injunction" enjoining the transfer of petitioner to Libya until further order.

4. Two days later, on April 25, 2007, the court of appeals denied petitioner's motion and dismissed his appeal for lack of jurisdiction. Pet. App. 1a-2a. Petitioner then filed an emergency application in this Court for an injunction barring his transfer. *Zalita* v. *Bush*, No. 06A1005 (filed Apr. 25, 2007). On May 1, 2007, this Court denied the application.

ARGUMENT

The court of appeals and the district court correctly determined that petitioner is not entitled to an order barring his transfer out of United States custody to his home country, because Congress has explicitly withdrawn jurisdiction from the courts to block the transfer

of detainees from Guantanamo Bay. In addition, because this petition involves a challenge to a transfer decision, it is not necessary to hold this case for the Court's decision in *Boumdiene* v. *Bush*, No. 06-1195, which does not present any transfer issue. Further review is not warranted.

1. The MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. It further states that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, *transfer*, treatment, trial, or conditions of confinement" of such an alien. *Ibid.* (emphasis added).

This petition for a writ of certiorari stems from the district court's denial of petitioner's motion to enjoin his potential transfer from Guantanamo Bay to Libya and the court of appeals' order stating that it lacked jurisdiction to accord such relief. In seeking injunctive relief, petitioner directly challenges an "aspect of the * * * transfer * * * of an alien who is * * * detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a), 120 Stat. 2636. Petitioner does not dispute that the MCA applies to his case. Thus, the district and circuit courts correctly held that they lacked jurisdiction to grant the relief sought.

2. It is not necessary to hold this petition pending the disposition of *Boumediene*. In particular, petitioner errs in asserting (Pet. 11-12) that "[i]f the Court [in

Boumediene] concludes that Guantanamo detainees have [a right to habeas relief in district court], Petitioner unquestionably would be entitled to challenge his anticipated transfer to Libya." The questions presented in *Boumediene* are whether Section 7(a) of the MCA removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay; whether those aliens have rights under the Suspension Clause; and if so, whether the MCA violates the Suspension Clause. Although petitioner did file a habeas petition, the relief he currently seeks—an injunction barring his transfer from Guantanamo—is not governed only by the first part of Section 7(a) of the MCA. In addition, it is a challenge to an "aspect of the * * * *transfer* * * * of an alien" governed by the second part of Section 7(a) (emphasis added). *Boumediene* does not involve a challenge to the second part of Section 7(a) of the MCA or the issue of whether courts may lawfully block a potential transfer. Even if the MCA's removal of federal court jurisdiction over habeas petitions seeking release were held to be unconstitutional, that holding would not affect the independent provision of the MCA that expressly removes jurisdiction over any claims regarding *transfers*. See MCA § 7(a), 120 Stat. 2635.

Moreover, the fact that petitioner seeks to block a potential transfer *out of* United States custody further distinguishes his claims from those raised in *Boumediene* and from traditional habeas claims more generally. Petitioner's request for injunctive relief raises no issues under the Suspension Clause. Habeas has traditionally afforded a mechanism for challenging one's detention, not for challenging one's transfer or release *out of* custody. See, *e.g.*, *Wilkinson* v. *Dotson*, 544 U.S. 74,

79 (2005) (explaining that the "core" relief afforded by the writ of habeas corpus is "immediate release or a shorter period of detention"); *id.* at 86 (Scalia, J., concurring); *Preiser* v. *Rodriguez*, 411 U.S. 475, 499-500 (1973); *Cochran* v. *Buss*, 381 F.3d 637, 639 (7th Cir. 2004).

3. Petitioner suggests (Pet. 13-23) that the MCA is unconstitutional because it violates separation of powers principles or the Due Process Clause. Those claims lack merit. As to separation of powers, petitioner's argument fails to take account of the Constitution's express grant of authority to Congress to define the jurisdiction of the lower federal courts. See U.S. Const. Art. I, § 8, Cl. 9; *id.* Art. III, § 1; see also *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). And as to due process, it is well established that the Fifth Amendment, including its Due Process Clause, does not apply to aliens, like petitioner, who have no presence in any territory over which the United States is sovereign. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" in "emphatic" terms.). Because the United States is not sovereign over Guantanamo Bay, the Fifth Amendment therefore does not protect petitioner. See Gov't Br. at 68-71, *Boumediene*, *supra*.[1]

4. In any event, petitioner's claim would also fail on the merits because the extraordinary relief he seeks

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[1] In any event, even aliens admitted to the United States do not have a due process right to avoid removal based on a claimed possibility of persecution or torture. See *Enwonwu* v. *Gonzales*, 438 F.3d 22, 29-30 (1st Cir. 2006); *Kamara* v. *Attorney Gen.*, 420 F.3d 202, 217 (3d Cir. 2005).

would conflict with separation of powers principles. The Executive's efforts to arrange for transfers of wartime detainees and to ensure that another country provides adequate assurances regarding its treatment of transferees is a quintessential function of foreign and military affairs within the sole province of the Executive. The process is "delicate, complex, and involve[s] large elements of prophecy. [It] should be undertaken only by those directly responsible to the people." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-112 (1948); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

The order petitioner seeks would directly intrude upon foreign and military affairs and, in particular, the government's ability to resettle wartime detainees. As explained in detail in the declarations of Ambassador Pierre-Richard Prosper and Deputy Assistant Secretary of Defense for Detainee Affairs Matthew C. Waxman, the United States has developed an elaborate inter-agency process to govern the transfer of an enemy combatant from Guantanamo Bay to the control of another country, typically the enemy combatant's home country. See Declaration of Matthew C. Waxman ¶¶ 6-7 (Waxman Decl.); Declaration of Pierre-Richard Prosper ¶¶ 3-4, 7 (Prosper Decl.) (Gov't Opp. to Pet. Mot. for Temporary Restraining Order Exhs. 1, 2). Repatriations and transfers of wartime detainees are typically the result of sensitive negotiations among Executive Branch officials with senior officials of foreign governments. See Waxman Decl. ¶¶ 6-7; Prosper Decl. ¶¶ 5-8.[2]

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[2] As explained in more detail in the opposition to petitioner's motion for an emergency injunction, it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured.

Entertaining petitioner's claim would require the Court to insert itself into extremely sensitive diplomatic matters. It would involve scrutiny of United States officials' assessments of the possibility of torture in a foreign country, including judgments regarding the state of diplomatic relations with a foreign government, the reliability of representations from a foreign government, and the adequacy of assurances provided and a foreign government's capability to fulfill them. Prosper Decl. ¶ 8.

In addition, requiring the United States "to disclose outside appropriate Executive branch channels its communications with a foreign government" could make that government "reluctant in the future to communicate frankly with the United States concerning such issues." Prosper Decl. ¶ 10. And "review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.*; see, *e.g.*, *Chi-*

Waxman Decl. ¶ 6; Prosper Decl. ¶ 4. If a transfer is deemed otherwise appropriate, assurances regarding the detainee's treatment are sought from the country to which the transfer of the detainee is proposed. Waxman Decl. ¶¶ 6-7; Prosper Decl. ¶ 6. If the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government. Waxman Decl. ¶ 7; Prosper Decl. ¶ 8. Indeed, the Department of Defense has decided in the past not to transfer detainees to their country of origin because of mistreatment concerns. *Ibid.* Petitioner is therefore incorrect when he asserts (Pet. 12)—as he did in his application to this Court seeking an injunction barring his transfer pending his appeal—that "[a]bsent a grant of certiorari and an order holding this case in abeyance, Petitioner will likely * * * face torture and persecution."

cago & S. Air Lines, Inc., 333 U.S. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. * * * [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial."). Thus, even if the district court had jurisdiction, petitioner would not be entitled to the extraordinary injunction he seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2007